

1819459 (Migration) [2019] AATA 2381 (15 April 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1819459

MEMBER: Amanda Mendes Da Costa

DATE: 15 April 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Statement made on 15 April 2019 at 8:27am

CATCHWORDS

MIGRATION – cancellation – Temporary Business Entry (Class UC) visa – Subclass 457 (Temporary Work (Skilled)) – relationship with sponsor no longer exists – no longer a member of family unit – relationship breakdown – notified the Department of the separation in writing – no known instances of non-compliance with visa conditions – credible and convincing witness – the employer an approved Standard Business Sponsor – recent nomination approval and current employment – decision under review set aside

LEGISLATION

Migration Act 1958 (Cth), ss 48, 116, 140
Migration Regulations 1994, Schedule 2, r 1.12

CASES

Hamilton v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 349

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 3 July 2018 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that the decision to grant the visa was based wholly or partly on a particular fact or circumstance, i.e. the relationship with her sponsor, that is no longer the case or no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 5 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A].
4. The applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

7. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
8. The applicant's Subclass 457 visa was granted because her application met, among other criteria, the secondary criteria for the visa on the basis that she was a member of the family unit of the primary visa holder [Mr B], as she was in genuine and continuing relationship with [Mr B], as prescribed by r.1.12 of the *Migration Regulations 1994* (the Regulations).
9. On 25 May 2017 the applicant was granted a Subclass 457 visa, on the basis that she was a member of the family unit of her partner [Mr B], who was primary visa holder.
10. The applicant arrived in Australia [in] June 2017 with [Mr B] and the couple remained together until January 2018 when they separated.
11. On 2 March 2018 the Department sent the applicant a Notice of Intention to Consider Cancellation (NOICC) of the visa. The applicant was invited to provide comments regarding the NOICC, which she did on 3 March 2018.
12. In her response, the applicant requested the delegate to exercise their discretion not to cancel her visa. She relied on the following matters as relevant to the exercise of the delegate's decision regarding the cancellation of her visa:

- She was employed at [Company 1] as a travel consultant, specialising in [Country 1] travel. Her employer had had created a part-time role (20 hours per week) to accommodate any application she might make for a student visa.
 - She had been proactive in researching scholarships and suitable courses available to her in [Australian City 1]. She had received an acceptance letter from [a] University to undertake [studies].
 - She would prefer to remain on her Subclass 457 visa to enable her to continue working on a full-time basis. If her employment became part-time she would experience difficulties in paying for rent, studies and living expenses and her family was unable to provide her with financial support.
 - She wished to remain in Australia on a Subclass 457 visa in order to have the opportunity to continue working on a full-time basis and ultimately apply for permanent residency. Although she was interested in further study, she did not wish such studies to compromise her full-time employment.
13. The applicant met her former partner, [Mr B] in South Africa in 2015. They commenced a de facto relationship and made plans to travel together. They initially planned to travel to [another country] but settled on Australia because [Mr B]’s uncle was prepared to sponsor his nephew and provide him with employment.
 14. The couple came to Australia in June 2017. Their relationship broke down when it became apparent to the applicant that [Mr B]’s mental health was deteriorating and he became aggressive and abusive towards her.
 15. The applicant and her partner commenced a ‘trial’ separation in November 2017 and made some attempt to reconcile. However in January 2018 they agreed that reconciliation was no longer an option and agreed to separate permanently. They have not resumed their relationship.
 16. When she separated from [Mr B], the applicant notified the Department of the separation in writing. The applicant subsequently received the NOICC and spoke to officers of the Department. She said that she also sought advice from her then migration agent who advised her that she would satisfy the criteria for either a visitor or a student visa. The applicant explained to the Tribunal that at the time her position appeared simple and straightforward in that a visitor or student visa was her only option. She said that in her discussions with the officers of the Department and her migration agent, she was not advised that she would meet the criteria for a skilled visa.
 17. The applicant subsequently made enquiries of various universities about suitable courses of study and scholarships available to her. She also sought assistance from her then employer, [Company 1], which operated a travel agency. Until then, the applicant had been employed there on a full-time basis as a travel consultant, specialising in [Country 1] tours. In order to assist the applicant with her studies and any application for a student visa, it reduced her work commitments to 20 hours per week and transferred her to sales and marketing duties.
 18. The applicant did not eventually take up any studies despite being offered a place in a [course] at [a] University. This was due to the applicant’s inability to afford the fees involved. In May 2018 the applicant was approached by an employment recruiter who had read her curriculum vitae on [a] website. The applicant was interviewed by the recruiter on two occasions and subsequently interviewed by [Mr A], the general manager of her current employer – [Company 2]. She commenced employment as a Marketing Specialist with this company in May 2018 and has continued in this employment since then.

19. *Evidence of [Mr A]*

20. [Mr A] is the general manager and a director of [Company 2]. He told the Tribunal that his company had [a number of] retail stores in [Australian City 1] and [a number of] online businesses, all specialising in travel services. In the past three years the business had experienced a rapid growth, increasing the number of its [stores] and increasing its profit substantially. It had also increased its [staff] in the past two years.
21. [Mr A] said that the applicant was one of four candidates for her current position but had clearly been the first choice for the company. During her time with the company the applicant had developed various web and social media sites, promoting specialist travel such as [in Country 1], health and harmony tours and guided tours and tours guided by staff members. The applicant had also increased the amount of traffic on the company's web sites, [and social media platforms].
22. The applicant was described by [Mr A] as a vital part of the company's business and the employee primarily responsible for its current successful marketing strategy. Given the applicant's value to the company it recently applied to the Department and was granted approval as a standard business sponsor. [Mr A] further explained that the company would shortly lodge an application for nomination of a position for the applicant, which if approved would enable the applicant to lodge a Subclass 482 visa application. Following the hearing, the Tribunal was provided with a copy of a notification of approval of a nomination granted to [Company 2], in respect of the applicant. This approval was granted by the Department on 5 January 2019 and is effective until 5 January 2024.
23. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

24. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
25. *The purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia*
26. The applicant arrived in Australia in June 2017. The purpose of her travel to Australia was to accompany the primary visa applicant while he was employed by an approved sponsor.
27. The applicant told the Tribunal that her relationship ended in January 2018. She then contacted the Department and advised officers by telephone and in writing that she and the sponsor were no longer together as a couple. The Tribunal accepts that the Department would not have been aware of the breakdown of the relationship without the information from the applicant.
28. *The extent of compliance with visa conditions*
29. There are no known instances of non-compliance with visa conditions by the applicant.
30. *Degree of hardship that may be caused (financial, psychological, emotional or other hardship)*

31. The applicant told the Tribunal that if her visa was cancelled and she were required to return to South Africa, she would find it difficult to obtain further employment as the manager of her previous employer in South Africa had left the company and she had no contacts there. The applicant further explained that her family were unable to provide her with financial support and she would be required to stay with friends until she found employment and re-established her life there.

32. *Circumstances in which the ground of cancellation arose*

33. The Tribunal accepts that prior to the cancellation of her visa, the applicant was the de facto partner of [Mr B]. That relationship ended in January 2018 when the couple separated. They have not resumed their relationship and the applicant is no longer a member of the family unit of [Mr B].

34. The Temporary Work (Skilled) visa is a temporary visa which enables the visa holder to remain in Australia temporarily for a period of four years. The purpose of that visa was to enable the applicant to accompany her sponsoring partner to Australia, as a member of the family unit of the primary visa holder, [Mr B], as she was in a genuine and continuing relationship with him. The Tribunal finds that when the relationship ceased grounds for cancellation of the applicant's visa existed as the decision to grant the visa was based wholly or partly on a particular fact or circumstance (i.e. the relationship with her sponsor) that is no longer the case, or no longer exists.

35. It is submitted on behalf of the applicant that in exercising its discretion regarding the cancellation of the visa, the Tribunal should take into account the behaviour of Departmental staff in failing to advise the applicant when she informed them that her relationship with the primary visa holder had broken down, that she had the option to apply for a Subclass 457 visa in her own right.

36. The Tribunal has been referred to the case of *Hamilton v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 349 (*Hamilton's case*) in which the Federal Court held that the applicant in that case had done her best to substantially comply with application requirements, particularly when the Department had given her incorrect or misleading information and incorrect and incomplete application forms. The applicant in *Hamilton's case* was in immigration detention and had not been given the explanatory notes that normally accompanied the visa application form which made it impossible for the applicant to properly complete the form.

37. The applicant's migration agent submits that although the factual situation in *Hamilton's case* was very different from that in this case, the decision is apposite to this case because of the failure of Departmental staff to advise [the applicant] of the option of applying for a Subclass 457 visa when her relationship with her former partner ended.

38. The Tribunal has been further referred to the comments of Justice Burchett in *Hamilton's case* (at p.363) where his Honour observed:

39. ... it is plain that Parliament's promise of an opportunity, restricted though it was, to put forward grounds for a further entry permit had been virtually withdrawn from Mrs Hamilton, not by the legislative will, but by bureaucratic inertia.

40. The applicant's migration agent submits that 'the same inertia' characterised the handling of [the applicant]'s situation and the decision to cancel her visa. [The applicant] was given no assistance by Departmental staff despite her efforts to obtain assistance from both the Department and her then migration agent.

41. It is further submitted that given that although Departmental staff were aware that her relationship with her former partner ended, and [the applicant] was considering applying for a student visa, they did not raise the possibility of employer sponsorship. This was surprising given that the policy guidelines state that secondary applicants should be treated sensitively if the primary visa holder dies or they are no longer part of the primary visa holder's family unit. Such sensitivity had not been shown to [the applicant] when her relationship ended.
42. The Tribunal found the applicant to be a credible and convincing witness. It accepts her evidence regarding her relationship with her former partner including the reasons for the breakdown of that relationship. The Tribunal finds that through her own skill and effort the applicant has obtained employment as a marketing specialist in Australia, primarily in the travel industry. The Tribunal further accepts the evidence of [Mr A] that the applicant's role as a marketing specialist for his company has made a significant contribution to the growth of that business in the past few years.
43. The Tribunal accepts the applicant's evidence that Departmental staff did not provide her with advice regarding her visa options when she informed them in January 2018 that her relationship with her former partner had ended. Whilst the Tribunal accepts that the applicant was unaware that she had other visa options at the time her relationship with her sponsor broke down, it does not consider that the role of the Department is to provide visa applicants with legal or immigration advice.
44. The Tribunal also notes that [the applicant] had the advice of her own migration agent. The agent's failure to advise the applicant about the option of applying for a Subclass 457 visa in her own right, whilst unfortunate, is not the responsibility of the Department.
45. The Tribunal also considers that [the applicant]'s situation can be distinguished from that of the applicant in *Hamilton's case* as Departmental staff did not provide her with incorrect or misleading information or provide her with incomplete documents.
46. However, the Tribunal does accept that the applicant was neither aware nor advised by others at the time her relationship with her former partner ended that one of her options was to apply for a Subclass 457 visa in her own right.

47. *Past and present behaviour of the visa holder towards the Department*

48. Nothing adverse is known about the applicant's past and present behaviour towards the Department. The Tribunal accepts that the applicant was honest in her communications with the Department and advised it of her separation from her former partner when the separation occurred. It is further satisfied that the applicant responded to the NOICC in a timely manner.

49. *Whether there would be consequential cancellations under s.140*

50. The applicant is a single woman without children or dependents. The Tribunal finds that the cancellation of the visa would not result in the consequential cancellation of any dependent visa holders.

51. *Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention*

52. If the applicant's visa is cancelled and unless she is granted another visa, the applicant will be an unlawful non-citizen and may be detained. There is no suggestion that she will be detained indefinitely because as a South African citizen she will be able to return to South Africa. The Tribunal acknowledges that unless the applicant is granted another visa, she may be subject to possible removal from Australia and she may be subject to an exclusion period in relation to some future visa applications. Section 48 of the Act prevents a non-citizen who held a visa that was cancelled under s.116 from applying for any visa not prescribed for the purposes of s.48 while in the migration zone.

53. *Whether any international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation.*

54. There is no evidence and the applicant does not claim, that Australia's non-refoulement obligations or the best interests of any children as a primary consideration would be breached as a result of the cancellation.

55. *Other matters*

56. On 5 April 2019 the applicant provided the Tribunal with a copy of the approval of the nomination for the applicant for the occupation of Marketing Specialist ANZSCO 225113, dated 5 April 2019.

57. The applicant's migration agent submits that the Tribunal should attach significant weight to the fact that the applicant's employer is now an approved Standard Business Sponsor for the next five years and its nomination for her position has been approved for two years. It is further submitted that if the Tribunal exercises its discretion to set aside the cancellation of the visa, the applicant's Subclass 457 visa will revive and she will be in a position to apply for a Subclass 482 visa pursuant to her employer's nomination. The Tribunal accepts these submissions.

58. FINDINGS

59. Considering the circumstances as a whole and particularly the applicant's current employment and the recent nomination approval, the Tribunal concludes that the visa should not be cancelled.

DECISION

60. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Amanda Mendes Da Costa
Member